ALJ / VDR / t94 / tcg *

Mailed 10/29/2001

Decision 01-10-066 October 25, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order to Show Cause Why the Burlington Northern Santa Fe Railway Company and the Union Pacific Railroad Company Should Not be Ordered to Comply With California Labor Code Section 6906.	Investigation 99-06-005 (Filed June 3, 1999)

O P I N I O N

Summary

We determine that respondents Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UPRR) should be ordered to comply with California Labor Code Section 6906(b).[1] Investigation (I.) 99-06-005 is closed.

Background and Procedural History

This proceeding is concerned with the issue of whether employees working as conductors in train service on California's two major common carrier freight railroads are properly qualified to do so under a California law that imposes experience requirements for such employment.[2] Traditionally, the route to qualification for promotion to the position of conductor was lengthy service as

[1] All references are to the California Labor Code unless otherwise noted.

[2] The conductor is the employee on board the train who is responsible for all aspects of its operation, other than operation of the locomotive.

a brakeman, assisting the conductor in a sort of apprenticeship capacity until the employee had sufficient experience to work as a conductor.[3] This practice has changed in recent years, and this circumstance is the occasion for this proceeding.

"Conductor" and "brakeman" are titles for operating crafts on the railroads. These jobs are defined by industry practice and collective bargaining agreements rather than by statute or regulation, and in recent years many of the historical railroad craft distinctions have disappeared with modernization of work rules to facilitate more efficient train operation. Historically, brakemen assisted the conductor, among other things by setting and releasing brakes, but the advent of modern braking systems has generally eliminated the need for this task. Other technological improvements in locomotives, cars, communications, signaling and failure detection devices since the end of the Second World War have eliminated other functions of the job, and for many train operations it is a totally redundant position. As a result new hiring and training practices enable employees to enter train service as conductors following only a period of formal training, and the pool of brakemen has greatly diminished by attrition.

Notwithstanding enormous changes that have taken place in the industry, California still has on its books a number of statutes premised upon railroad

[3] This promotional system paralleled that for an engine service employee, who served for a long period as a fireman before qualifying to become an engineer.

employment practices of the past.[4] One such California statute is Section 6906, which states in pertinent part:

[4] For example, Section 600(c) includes motormen and telegraph operators, as well as conductors and brakemen within the definition of "trainmen." Although some of these jobs have survived, their functions have changed greatly.

> No common carrier shall employ any person as:
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> * * *
>
> (b) A conductor who has not had at least two years' actual service as a brakeman in road service on a steam or electric railroad other than a street railway, or one year's actual service as a railroad conductor in road service.

We initiated this formal investigation because the United Transportation Union (UTU) reported to us that the respondents were violating this subsection of Section 6906. These reports were corroborated by our staff, based upon employment records and other documentation furnished voluntarily by the respondents at staff's request.

On the basis of the investigative record, we issued a formal Order to Show Cause (OSC) "for the limited purpose of determining why the BNSF and the UPRR should not be ordered to comply with the conductor qualification requirements of [Section 6906]."[5] The OSC provided the respondents and the UTU an opportunity to present "evidence and/or argument" on this issue.[6] The OSC also reflects our concern that the respondents' failure to comply with the experience requirement of Section 6906 might present a safety problem.

The assigned Administrative Law Judge (ALJ) held an initial prehearing conference (PHC) to establish a procedural schedule. Because the respondents indicated that they intended to challenge the validity of Section 6906 as part of their showing as to why they should not comply with it, the ALJ structured the

[5] OSC, Ordering Paragraph (O.P.) 1 of I.99-06-005.

[6] OSC, O.P. 3.

proceeding so that this legal issue could be addressed before any evidence was taken. On September 3, 1999, the respondents filed a motion to dismiss. The issue was fully briefed by the respondents and the UTU. By ALJ Ruling dated May 25, 2000, the motion was denied and the proceeding progressed to the evidentiary stage. The ALJ held a second PHC on June 21, 2000, and established a schedule for the evidentiary phase. No hearing was held. Instead, two rounds of written testimony and briefs were filed, and the proceeding was submitted on November 13, 2000.

Discussion

There is no serious dispute that the respondents are employing conductors in violation of the literal requirements of Section 6906. The respondents candidly admit that newly hired trainmen are generally promoted as conductors after a training period of well under one year. This is supported by their own employment records and the testimony of their operating managers. Train service employees are given 13 or 14 weeks of comprehensive training in all aspects of a trainman's job, including safety and operating rules, and make a number of student trips. They must also demonstrate their knowledge by passing written tests. When they have successfully satisfied these student/training requirements, they begin their careers as conductors.[7]

The respondents assert that this system produces uniformly trained, well-qualified conductors, who have demonstrated their ability to operate trains safely, as proven by uncontroverted evidence. At the same time, direct

[7] Pursuant to federal regulatory requirements, these operating employees subsequently must also undergo periodic "efficiency testing," a term that refers to rule compliance tests conducted while they are operating trains.

promotion of conductors in this fashion has restricted the availability of experienced brakemen who could qualify for promotion to conductors under Section 6906(b). Although there are still some qualified brakemen in train service because of "grandfather" provisions in collective bargaining agreements between the UTU and the respondents, their number is fast dwindling. There is no dispute that the number of qualified brakemen is insufficient to fulfill the need for new conductors.

The respondents assert that if Section 6906 is enforced, they will be unable to comply without causing severe disruption to their operations and suffering financial hardship, particularly because the changes in train staffing and conductor promotion practices began more than a decade ago and could not easily be reversed after such a long period. They have furnished considerable testimony to support these assertions. The respondents also argue that we must not require them to comply with Section 6906, because the statute is unconstitutional, preempted by certain federal legislation, and inconsistent with the manning of trains permitted under California's Anti-Featherbedding Act.[8] These are essentially the same arguments they offered unsuccessfully to support their motion to dismiss this proceeding.

Although these contentions are not without merit, as the ALJ stated in his Ruling denying that motion, they are not dispositive of the matter of conductor qualification requirements. Moreover, the Commission is foreclosed under these circumstances from conceding federal preemption. Article III, section 3.5 of the California Constitution expressly provides that state administrative agencies

[8] This was enacted as Section 6900.5 of the Code.

may not declare a statute to be unconstitutional, unenforceable or preempted by federal law, or to refuse to exercise their enforcement powers on such grounds, unless an appellate court has declared the statute to be unconstitutional or unenforceable. No appellate court has expressly invalidated Section 6906(b).

The respondents argue that Article III, section 3.5 does not bar us from refusing to enforce section 6906 because an agency may do so "(i) based on preemption or constitutional grounds where . . . an appellate court has blazed the trail; or (ii) if enforcement would result in violation of inconsistent *state* requirements."[9] The respondents point out that the United States Supreme Court long ago declared a similar Texas statute to be unconstitutional in *Smith v. Texas*, 233 U.S. 630, 345 Ct. 681, 58 L.Ed. 1129 (1914), and that the California Attorney General even opined that Section 6906(a) was invalid (2 Ops. Atty. Gen. 157 (1943)). In urging that we have the power to invalidate Section 6906(b), the respondents rely upon *Rees v. Kizer*, 46 Cal.3d 996, 251 Cal.Rptr. 299 (1988), which states that Article III, Sec. 3.5 "cannot reasonably be construed to place a restriction on the authority of the legislature to limit the scope of its own enactments." (46 Cal.3d at 1002.) They assert that because enforcement of Section 6906(b) would have the consequence of requiring them to employ unneeded brakemen for two years in order to qualify them for promotion, it is contrary to the terms of their collective bargaining agreements, which in turn conflicts with Section 6900.5 by limiting its scope.[10]

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[9] Opening Brief, p. 3.

[10] Section 6900.5 permits the number of train crew members to be established by collective bargaining agreements pursuant to the award in Federal Arbitration Board No. 282. Although *crew size* is established by the parties' collective bargaining

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As the California Supreme Court explained in *Rees v. Kizer, supra,*

> Article III, section 3.5, which was enacted by the voters in 1978, was placed on the ballot by a unanimous vote of the legislature in apparent response to this court's decision in *Southern Pac. Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308 . . . in which the majority held that the Public Utilities Commission had the power to declare a state statute unconstitutional. [Citations omitted.] The purpose of the amendment was to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature. (46 Cal. 3d at 1002.)[11]

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agreements, UTU argues that those agreements do not settle the issue of employees' *qualifications* to become conductors. UTU Response to Respondents' Motion to Dismiss (October 18, 1999), pp. 3-4.

[11] Art. 3, § 3.5 of the Cal. Const. was enacted by initiative passed on June 6, 1978. The *Southern Pacific,* decision *supra,* is helpful in explaining why. The California Supreme Court in that decision ratified this Commission's act of declaring invalid a provision of the California Public Utilities Code concerning the maintenance of railroad grade crossings for public use. In a learned dissent, the late Justice Mosk provided the rationale for the Legislature subsequently to place Article III, section 3.5 on the ballot:

> . . .[N]o constitutional authority, express or implied, can be found in support of the PUC's assertion of power [by declaring the PU Code provision to be invalid.] This alone leads to a conclusion that the commission's act was ultra vires, but because of the importance of the issue it may be useful to explore underlying policy arguments sometimes advanced in an effort to justify the exercise of constitutional review by an administrative agency.
>
> It may be urged that administrative agencies must be granted such power in order to avoid injustice in some cases. *Obsolete and patently unconstitutional laws remain on the statute books* and according to this argument they should be removed by the governmental body with the first opportunity to do so [italics added]. This is particularly desirable with regard to the PUC. . . .
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> It is true that if the commission lacks constitutional review power, an invalid statute will remain in effect during the interval between the PUC decision and this court's reviewing opinion. But on the other hand a time lag will also occur when the commission . . . erroneously declares a law unconstitutional:

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It may well be that Section 6906 has become obsolete over time.[12] Nevertheless, the respondents must resort to a different forum to raise that issue, and we anticipate that they will do so. In the meantime, on the record before us, we find that permitting the status quo to be maintained for the period of any appeal would not compromise the safety of the respondents' employees or the general public.

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during the period before this court reverses the commission, legislation duly enacted by the representatives of the people of California will not be enforced. [Citations omitted.] The question, accordingly, is which time lag is the less undesirable: a period during which an unconstitutional law remains effective prior to court review, or a delay during which a valid legislative measure is rendered inoperative.

. . . [T]he resolution is not difficult. Laws passed by a legislature represent the will of the people, and courts in a democratic society are understandably reluctant to nullify that will. Consequently, in California as in all American jurisdictions, not only do courts presume that statutes are constitutional until clearly proven otherwise, but they normally will not decide constitutional challenges unless the responsibility is unavoidable. [Citations omitted.] When a court exercises such restraint, a statute of questionable validity may remain effective until revised by the Legislature or struck down in a later case in which the constitutional issue is unavoidable. But the belief is implicit in our system that any adverse effects of such a delay are less harmful than the consequences of a court's precipitous and erroneous decision that a statute is unconstitutional. A fortiori, the delay caused by an administrative agency's inability to render a decision on the constitutionality of a statute is preferable to the situation created by an erroneous administrative nullification of a legislative act. (18 Cal.3d 319-320.)

These principles, which drove the subsequent enactment of Article III, Section 3.5, explain the result we reach today: the power to invalidate a provision of state laws, no matter how quaint or archaic, clearly belongs to the Legislature and the courts alone.

[12] We also acknowledge the respondents' argument that the *de facto* result of complying with this narrowly drawn statute may not be consistent with the broader mandate of Section 6900.5.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. The respondents jointly filed comments on September 10, 2001. Those comments propose additional findings of fact, which we reject because they are either immaterial legal conclusions or findings of fact that are inappropriate to our decision.

Findings of Fact

1. Respondents BNSF and UPRR are, respectively, common carriers by railroad that operate lines of railroad within the State of California.

2. BNSF and UPRR each employ persons in California as conductors.

3. The majority of persons hired and employed by BNSF and UPRR as conductors since 1994 have had neither two years' actual service as brakemen on a steam or electric railroad other than a street railway, nor one year's actual service as railroad conductors in road service.

4. Persons hired and employed by BNSF and UPRR as conductors who have not had such prior service as brakemen or conductors have instead received 13 or 14 weeks of formal training and testing before being promoted as conductors.

5. The hiring, promotion and employment of persons as conductors in the manner set forth in the preceding paragraph has been performed since 1994 under the terms of collective bargaining agreements between BNSF and UPRR, respectively, and UTU.

6. BNSF and UPRR have demonstrated by substantial evidence on the record in this proceeding that the safety of their employees and the general public since 1994 has not been adversely affected by the promotion and employment of persons in the manner set forth in paragraph 4.

7. Permitting the status quo to be maintained for the period of any appeal of this order would not compromise the safety of the respondents' employees or the general public.

Conclusions of Law

1. The Commission has jurisdiction to enforce Cal. Lab. C. § 6906(b) under Cal. Lab. C. § 6900.

2. Respondents BNSF and UPRR, respectively, are not in compliance with the conductor qualification requirements of Cal. Lab. C. section 6906, and specifically subsection (b) thereof.

3. This Commission should order respondents BNSF and UPRR to comply with the conductor qualification requirements of Cal. Lab. C. § 6906(b).

O R D E R

IT IS ORDERED that:

1. Pursuant to § 6906 of the California Labor Code, respondents Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, respectively, are ordered to refrain from employing any person as a conductor who has not had at least two years' actual service as a brakeman in road service on a steam or electric railroad other than a street railway, or one year's actual service as a railroad conductor in road service, as specified in subsection (b) thereof.

2. Investigation 99-06-005 is closed.
3. This order is effective today.

Dated October 25, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners